***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S REPLY BRIEF

B 76

# 76-4054

## United States Court of Appeals

FOR THE SECOND CIRCUIT

RCA GLOBAL COMMUNICATIONS, INC.,

*Petitioner,*

—against—

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

*Respondents,*

and

ITT WORLD COMMUNICATIONS INC.,
TRT TELECOMMUNICATIONS CORPORATION, and
WESTERN UNION INTERNATIONAL, INC.,

*Intervenors.*

ON PETITION FOR REVIEW OF REPORT, OPINIONS AND ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

# REPLY BRIEF AFTER REMAND OF PETITIONER RCA GLOBAL COMMUNICATIONS, INC.


CAHILL GORDON & REINDEL
*Attorneys for Petitioner*
*RCA Global Communications, Inc.*
80 Pine Street
New York, New York 10005
(212) 825-0100

*Of Counsel:*

H. RICHARD SCHUMACHER
ROBERT T. QUINN
JOHN A. SHUTKIN

and

FRANCES J. DEROSA
CHARLES M. LEHRHAUPT
*RCA Global Communications, Inc.*
60 Broad Street
New York, New York 10004


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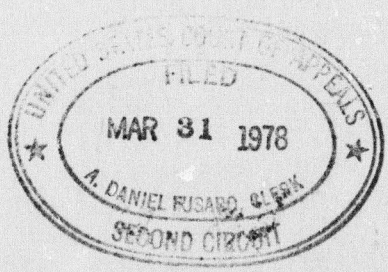

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# REPLY BRIEF AFTER REMAND OF PETITIONER RCA GLOBAL COMMUNICATIONS, INC.

Petitioner RCA GLOBAL COMMUNICATIONS, INC. ("RCA Globcom") submits this reply brief in further support of its

Petition for Review which asks the Court to vacate and set aside various Orders of the FEDERAL COMMUNICATIONS COMMISSION ("FCC" or "the Commission") insofar as they prescribe amendments to the "International Formula" required by Communications Act § 222(e), added by 57 Stat. 5 (1943), 47 U.S.C. § 222(e)(1970).

## POINT I

### THE COMMISSION'S DECISION DEPENDS ON ITS PREMISE THAT THE FORMULA CHANGE WILL IMPROVE SERVICE TO THE PUBLIC

The Order which the Commission has returned to the Court after its earlier remand, represents the Agency's third address to the International Formula. (SJA 1121; JA 70; SJA 949) On each occasion the Commission has concluded that the formula, to which the parties agreed in 1943, see Separate Report of the Commission on Formulas for the Distribution of International Traffic, 10 F.C.C. 184, 189 (1943), should be displaced in favor of the so-called "interim formula" for the same fundamental reason.

Now, as two times before, the Commission seeks to justify its abrupt shift of some almost 1,000,000 inbound and outbound telegrams per year, from RCA Globcom (JA 684)

to Intervenors ITT WORLD COMMUNICATIONS INC. ("ITT Worldcom") and TRT TELECOMMUNICATIONS CORPORATION ("TRT")* by asserting that the formula change is likely to improve the overseas telegram service available to the American public. (SJA 1133, 1146; JA 74; SJA 959-60) The change is said to remove alleged disincentives to better service which the Agency says are embodied in the original formula (SJA 1133; JA 74; SJA 959-60). Symmetrically, in the Commission's view, the new formula creates what it calls a "powerful incentive" to "best service at lowest possible rates." (SJA 959; see also SJA 1133; 1146; JA 74).

Thus a concept of the "public interest" has been (SJA 1133; JA 74), and remains (SJA 959), the linchpin of the Commission's preference for the "interim formula" -- a preference which the Agency now would make permanent since now the Commission concedes that the new formula's initial status as a way station to the "all-routed" plan was unsound (compare

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* Compare SJA 1129 (distribution of unrouted traffic pursuant to parties' agreed formula during 13 weeks in 1974) with SJA 1120 (distribution pursuant to prescribed replacement formula during first six months of 1977). The unrouted traffic pool which The Western Union Telegraph Company distributes to the international record carriers in accordance with a formula has run, in recent years, to about 3,000,000 messages a year (SJA 1129).

SJA 1146 with SJA 950-51). If the Commission's premise that its ordained formula shift is likely to result in service improvements cannot stand -- if that premise is unwarranted by reason or plausible record fact -- then, we submit, the Agency's decision also must fall. While a Commission order can be -- and the ones in suit deserve to be -- challenged for many reasons, the Orders can be sustained only on the grounds the Agency itself has chosen. See, e.g., SEC v. Chenery Corp., 318 U.S. 80, 87-88 (1943), after remand, 332 U.S. 194, 196 (1947); Grace Line, Inc. v. FMB, 263 F.2d 709, 711 (2d Cir. 1959).

The Commission, to be sure, has asserted its "public interest" premise on several occasions. And the proponents of its Orders obviously think they can sustain those Orders here if they remind the panel, even more frequently, that the Agency has so asserted. But, even if due allowance be made for the Commission's "expertise", we do not deal with an Agency's ipse dixit "which is beyond judicial scrutiny".* Rather, the Court confronts Orders measurable by the conventional standards of the Administrative

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* Cf. Frank, J. in Old Colony Bondholders v. New York, N.H.&H.R.R., 161 F.2d 413, 450 (2d Cir.), cert. denied, 331 U.S. 859 (1947) (the Agency's "ceremonial woosh woosh").

Procedure Act, 5 U.S.C. § 706 (1976). And, by those tests, as we have shown before and will demonstrate again, the Commission fails.

## POINT II

### THE COMMISSION'S ASSERTION THAT ITS FORMULA CHANGE WILL IMPROVE SERVICE TO THE PUBLIC IS UNWARRANTED BY THE STANDARDS OF THE ADMINISTRATIVE PROCEDURE ACT

The "public interest" analysis embodied in the Order which the Commission has returned to the Court after the earlier remand is, we submit, both arbitrary and capricious and unsupported by substantial evidence.*

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* There is debate in the briefs (see RCA Globcom Br., p. 38n; FCC Br., p. 24; ITT Worldcom Br., p. 40; TRT Br., p. 16-19) as to which of these tests should be invoked in this case. The standards are not categorical alternatives, and where, as here, the substantial evidence test does apply, it and the concept of "arbitrary and capricious" are separate and cumulative measures. Note, Judicial Review of Facts in Informal Rulemaking: A Proposed Standard, 84 Yale L.J. 1750, 1751-56 (1975). An Order which requires substantial evidentiary support cannot be sustained without it, but the presence of such support will not necessarily save the Order from a determination that it is arbitrary and capricious. Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 284 (1974).

The attempt, most evident in ITT Worldcom's submission, to exclude the substantial evidence test from the present review is unsound. Unlike National Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688 (2d Cir. 1975), cert. denied, 423 U.S. 827 (1975), the present proceeding does not involve review of a District Court action to enjoin regulations promulgated pursuant to an administrator's general power to issue, without reference to a hearing requirement, regulations implementing a governing statute. Although the Court presently confronts Orders which are classifiable as a "rule"

(Footnote continued on next page)

When the case was last before the Court, the panel called attention to "'the public interest' which in a factually-

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(Footnote continued from previous page)

under the categories of the Administrative Procedure Act, the "rule" has nevertheless emerged from an adversarial proceeding in the context of a "formal rulemaking" in which the Commission at the outset, designated parties respondent (see International Record Carriers Scope of Operations, 43 F.C.C.2d 1174, 1182 (1973), (JA 101)). The Commission's right to promulgate such a "rule" is conditioned by a statutory requirement of a "full hearing" and by specific substantive standards set out in the enabling enactment. (See Communications Act § 222(e)(3); 47 U.S.C. § 222(e)(1970).) The promulgation is reviewable here on "the record of the . . . evidence adduced . . . when the agency has held a hearing . . . required . . . by law." (See 28 U.S.C. § 2347(a)(1970).)

As Mr. Chief Justice Hughes wrote of "full hearing", only a few years before Section 222's enactment, in Morgan v. United States, 298 U.S. 468, 480 (1936):

> "The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument." (Emphasis supplied)

Thus, the condition specified in 5 U.S.C. § 706(2)(E)(1976) for application of the substantial evidence test -- review "on the record of an agency hearing provided by statute" -- is met. Whether RCA Globcom's right to a "full hearing" under Communications Act § 222(e)(3) extends far enough to embrace a full trial-type hearing in all cases is, for present purposes, beside the point. Further, even when reviewing "informal" FCC rulemaking, the Supreme Court has without so ruling, appeared to assume substantial evidence to be the applicable standard of review. United States v. Midwest Video Corp., 406 U.S. 649, 671, 673 (1972).

unsupported and conclusory way was so stressed in the FCC opinions" and pointed out that "the FCC's statements of possible improvements are wholly suppositious." (563 F.2d 1, 2; SJA 947) The Commission has returned the case to the Court with an opinion which, for all practical purposes, is virtual carbon copy of its defective precursors.

Although the Commission's earlier visions of an "all-routed" future have disappeared,* we are told, as before, that the new formula will remove an impediment to the international carriers' pursuit of routings and that that impediment blocked, and the new formula will promote, service improvement (compare SJA 1133, 1146 with SJA 951, 959-60). But the Commission's implicit assertion of a positive cause-and-effect relationship between the formula shift which it has dictated and service quality remains, we submit, implausible, unsupported obiter.**

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* The "all-routed" concept, like the present formula, was espoused by no one in the proceedings which led up to the Commission's initial Report and decretal Order in this Docket. (JA 169-669; SJA 951, 1126-28) Both represent unsolicited exercises of the same expertise.

** RCA Globcom, on the other hand, documented in the record on remand negative effects precipitated by the formula change -- a diversion of some traffic from direct to indirect routings and an increased emphasis on costly "marketing" activities which seem, to us at least, a wasteful drain on a branch of the international telecommunications industry which is experiencing a long-run secular decline. (SJA 979-992) The Commission appears to view these harms as less substantial than we do (SJA 958-59), and we have no inclination to burden this reply brief with redundant debate about how high is up. The important point is that the already discernible effects of the formula change on service quality, be they large or small, are negative.

Neither the Commission nor anyone else has identified a single service improvement which was even arguably affected, let alone deterred, by the shape of the formula during the 33 years of revolutionary technological advance between 1943 and 1976. This is scarcely surprising. If one moves from the proponents' reiterative assertion of generalized "competitive" dogma to the level of fact, no one can offer a convincing explanation of why the prior formula offers any carrier an advantage on which it could prudently attempt to "coast".*

As for the improvements to be wrought by the new formula, there is only ITT Worldcom's showing that it has made some modest adjustments in its computerized distribution devices "since" the implementation of the formula change (SJA 1032, 1040-44). To be sure, ITT Worldcom also offers the diffident suggestion that these adjustments might have

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* The Commission noted, when it promulgated the original formula, that it "continues and even promotes reasonable competition." See Separate Report, 10 F.C.C. 184, 195 (1943). The so-called "balancing provisions" of the prior formula affected, in recent years, only a tiny fraction of the overseas telegram pool (SJA 1014), which, itself represent only a small portion of the traffic (of various kinds) which the carriers haul on their systems (SJA 1129). The concept of "system" is important. There is no way a carrier could "loaf" on its telegram service to a country to which the prior formula accorded it a major fraction, or even all, of the unrouted traffic without impairing the system's capacity to provide, at the highest standards, other, more substantial services. (See Brief of Western Union International of November 1976 to this Court, p. 15.)

occurred by reason of the formula change.* But to treat such testimony, scarcely rising to the level of speculation, as "substantial evidence" of the new formula's positive effect on service quality would be a distortion of the term.

As Mr. Justice Frankfurter wrote in Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951):

> "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."**

Here, of course, ITT Worldcom's surmises suffer, not detraction, but destruction, at the hands of an unanswerable record of 33 years under the supposed "disincentives" of the prior formula. As this Court put it, "high quality of service is conceded and there is no showing that the carriers have not availed themselves of the most modern technological devices." (559 F.2d at 889, SJA 943)

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* The Commission's repudiation of the formula to which the carriers previously agreed has conferred upon ITT Worldcom additional traffic revenues of more than $1,000,000/year. (See ITT Worldcom's August 4, 1976 Affidavit to this Court in support of a scheduling order.) It is grotesque to suggest that it needs a subsidy of such magnitude to call forth tinkering of the kind to which its untested affidavits refer.

** Quoted, more recently, with approval in Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 284 (1974).

The Commission has repeatedly asserted, but it has not plausibly demonstrated, because it cannot, a causal relationship between its formula prescription and improved service quality.

## POINT III

## THE FORMULA PRESCRIBED BY THE COMMISSION IS NOT "JUST", "REASONABLE" AND "EQUITABLE"

The Commission's focus on the supposed likelihood of service improvements was to be expected for at least two reasons.

First, Communications Act § 222(e)(3), 47 U.S.C. § 222(e)(3)(1970), makes the "public interest" an imperative component of any Order prescribing a new formula. Second, if the Commission's dictated formula shift is not likely to improve service to the public, then there is little to be said for its handiwork.

Without a valid "public interest" predicate, the Commission has simply annulled, by no sanction but its desire, a formula to which the parties agreed and which was objectionable in intervenors' view, only because it afforded RCA Globcom a share of the unrouted traffic pool which those competitors, in recent years, have come to view as "too large".

Unaided by the notion of service improvement, the Commission has been unwilling, as obviously it should be, to call such a result "just", "reasonable" and "equitable".

The proponents of the Commission's Orders scorn RCA Globcom's reference to the agreed basis of the prior formula. They note that the Court recognized a sensible limit to RCA Globcom's "contractual" equity when it pointed out, in its earlier opinion, that RCA cannot "sit back and do nothing (563 F.2d 1, 2; SJA 947). But, unfortunately for proponents' line of argument, there is not even a hint of a suggestion in the record that RCA Globcom ever has done so.* And, in the absence of an adverse public effect, agreement is, on the record compiled by the Commission, a better warrant for a formula than any other that has been suggested. It has a basis in both the language of Section 222 and axiomatic principles of the Anglo-American legal tradition.

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* Even during the "test" period of 1974, when ITT Worldcom enjoyed a temporary lead which it has since lost to RCA Globcom (compare SJA 1130 with SJA 1120), RCA Globcom attracted virtually the same share of routed traffic as ITT Worldcom and a considerably larger share than Western Union International, Inc. ("WUI"), the successor to The Western Union Telegraph Company's former cables division. Through the decade prior to the introduction of the formula mode in 1943 RCA Globcom had a considerably smaller market share than both Western Union "cables" and ITT Worldcom (then known as the "AC&R" group of cable and radio companies). See the statistics provided in Western Union Tel. Co., 25 F.C.C. 35, 69 (1958) vacated, 267 F.2d 715 (2d Cir. 1959).

## POINT IV

## THE HEARING ON REMAND WAS INADEQUATE

Our earlier briefing showed that the Commission, if it was inclined to credit ITT Worldcom's speculations about the reasons for "service improvement" which it has made since the formula shift, owed RCA Globcom a more substantial hearing than the Agency allowed.

Commission counsel and the Order's other proponents now seek to lay responsibility for this deficiency on remand at the door of either this Court or RCA Globcom. Both arguments are unavailing.

This Court did not order any specific procedure or time limit for the proceedings on remand. It did, to be sure, suggest that the Commission move with a dispatch not evident at every stage of these long proceedings. But the Court made further proceedings "subject . . . to such scheduling as the FCC may direct." (563 F.2d at 3, SJA 948) This approach was consistent with established authority, e.g., FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 333 (1976), and left the Commission free, and duty bound, to afford RCA Globcom the "full hearing" mandated by Communications Act § 222(e)(3), 47 U.S.C. § 222(e)(3)(1970).

Similarly, RCA Globcom cannot be validly attacked for attempting to raise here "questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass." Communications Act § 405, 47 U.S.C. § 405 (1970). The Agency had more than an opportunity to pass upon, it did pass upon, the question of the shape of its hearing procedures on remand. It did so, sua sponte, in the Common Carrier Bureau's letter of October 7, 1977 which laid down the ground rules by which the Bureau would prepare a further Order for the Commission's consideration. (SJA 972) RCA Globcom's compliance with the Agency's procedural rulings while before the Commission hardly deprives it of the right to complain about them here.

In any case, the Commission owed the public, no less than RCA Globcom, a procedure fit for a proper ventilation of the issues before it. If the first, and only contemplated, round of remand briefing before the Agency revealed issues which required further exploration, the Commission should have called for additional comment. The Commission conventionally does so, e.g., Radio Relay Corp. v. FCC, 409 F.2d 322 (2d Cir. 1969), and it should have done so here where RCA Globcom's demand for a "full hearing" has been on the table since the inception of the Docket and where its

comment on remand expressly told the Agency, the issues presented "require[d] further study and analysis." (SJA 975)

## CONCLUSION

The Commission has had more than enough chances to validly explain why the formula to which the parties agreed in 1943 should now be displaced by the so-called "interim formula". It has been unable to do so. The Commission's Orders annulling the original formula and mandating a replacement should be vacated.

Respectfully submitted,

CAHILL GORDON & REINDEL
Attorneys for Petitioner
RCA Global Communications, Inc.
Office and P.O. Address:
80 Pine Street
New York, New York 10005
(212) 825-0100

Of Counsel:

H. RICHARD SCHUMACHER
ROBERT T. QUINN
JOHN A. SHUTKIN

and

FRANCES J. DeROSA
CHARLES M. LEHRHAUPT
RCA Global Communications, Inc.
60 Broad Street
New York, New York 10004

March 31, 1978

CERTIFICATE OF SERVICE

I, H. RICHARD SCHUMACHER, certify that on this 31st day of March, 1978, the supplemental reply brief after remand of petitioner RCA Global Communications, Inc. was served on all parties to this proceeding by mailing copies, in a sealed wrapper, first-class postage prepaid, to each party below identified represented by counsel located outside New York, New York, and by hand delivering copies of said reply brief to those parties represented by counsel located within New York, New York.

Honorable Griffin B. Bell
Attorney General of the United States
Attention: Joen Grant, Esq.
U.S. Department of Justice
Washington, D.C. 20531
Attorney for Respondent
United States of America

Robert R. Bruce, Esq.
General Counsel
Attention: Jack David Smith, Esq.
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554
Attorney for Respondent
Federal Communications Commission

LeBoeuf, Lamb, Leiby & MacRae
Attention: Grant Lewis, Esq.
140 Broadway
New York, New York 10005

Attorneys for Intervenor
ITT World Communications Inc.

Covington & Burling
Attention: Edward Bruce, Esq.
888 16th Street, N.W.
Attorneys for Intervenor
TRT Telecommunications Corp.

Stroock & Stroock & Lavan
Attention: Alvin K. Hellerstein, Esq.
61 Broadway
New York, New York 10006

Attorneys for Intervenor
Western Union International, Inc.

H. Richard Schumacher
Of Counsel to RCA Global
Communications, Inc.